

**LOTTERY AUTHORITY, IOWA[531]**

**Adopted and Filed**

**Rule making related to appeals**

The Board of Directors of the Iowa Lottery Authority hereby amends Chapter 2, “Purchasing,” and Chapter 5, “Contested Cases,” Iowa Administrative Code.

*Legal Authority for Rule Making*

This rule making is adopted under the authority provided in Iowa Code section 99G.9(3).

*State or Federal Law Implemented*

This rule making implements, in whole or in part, Iowa Code chapter 99G.

*Purpose and Summary*

These amendments update the Lottery’s processes on the receipt and review of administrative appeals. These amendments provide structure for vendor appeals and remove from licensing appeals the concept of the Lottery “hearing board” appointed by various Lottery officials. Rather, for both types of appeals, the Lottery’s chief executive officer (CEO) will appoint an administrative law judge from the Administrative Hearings Division of the Iowa Department of Inspections and Appeals to serve as presiding officer and issue a proposed ruling. All appeals from proposed decisions are submitted to the Lottery’s chief executive officer, who issues the final decision on behalf of the agency.

*Public Comment and Changes to Rule Making*

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on July 31, 2019, as **ARC 4563C**. No public comments were received.

A Lottery representative appeared before the Administrative Rules Review Committee to discuss the proposed rule making at the Committee’s August 12, 2019, meeting. Questions to the Lottery from Committee members focused on three general areas: (1) whether the proposed change in procedure would still provide vendors, retailers and other licensees with appropriate safeguards; (2) whether the proposed change would consolidate power with the Lottery CEO; and (3) whether other state entities have appeal procedures similar to the change proposed by the Lottery.

Following the August 12 meeting, the Lottery worked with the Iowa Attorney General’s office to research the areas in question. The Lottery concurs that an administrative appeal process should involve a variety of perspectives and asked the Lottery Board at its meeting on November 19, 2019, to adopt a revised version of the rule making. The Lottery believes that the updated procedure will serve the public good by clarifying the Lottery’s administrative appeal process and ensuring that a variety of viewpoints are involved in it.

**Issue (1): Appropriate appeal safeguards**

A member of the Administrative Rules Review Committee questioned whether the Lottery’s rule making would provide vendors, retailers, and other licensees with appropriate safeguards in the appeal process.

**Board response:** This rule making will change the structure of the vendor appeal and licensing appeal process at the Lottery. Under the revised process, the Lottery CEO refers any appeal to an administrative law judge within the Department of Inspections and Appeals, who would issue a proposed decision. If desired by the party involved, that decision could be appealed to the Lottery CEO.

The model/uniform rules on agency procedure, which many state agencies have adopted, provide the option for a similar process.

**Issue (2): Whether change would consolidate power with CEO**

A member of the Administrative Rules Review Committee questioned whether the proposed rule making would consolidate power with the Lottery CEO.

Board response: In terms of consumer friendliness and ensuring due process, this rule making will make it clear that an appeal will be heard by an administrative law judge who is not affiliated with the Lottery. The current procedure, which utilizes a Lottery hearing board for appeals, is unable to uniformly specify the membership of the board because that membership has changed at times to ensure the involvement of neutral parties. Appeal beyond the administrative law judge would be to the Lottery CEO, and should an impacted party wish to appeal the Lottery's agency decision, this rule making preserves the party's ability to request judicial review within the court system.

This rule making will implement the Iowa Lottery Authority Act (Iowa Code chapter 99G), which directs the Lottery Board to adopt policies and procedures and promulgate administrative rules relating to the management and operation of the Lottery, while allowing the Board to delegate to the Lottery CEO those duties it deems appropriate. Likewise, the Act also authorizes the Lottery CEO to conduct hearings or administer oaths for the purpose of assuring the security and integrity of Lottery operations or determining the qualifications of or compliance by Lottery vendors and retailers.

Review of an appeal by the head of the agency also appears to be consistent with the Iowa Administrative Procedure Act (Iowa Code chapter 17A), which addresses and governs all agencies.

#### Issue (3): Similar appeal processes at other state entities

A member of the Administrative Rules Review Committee asked whether other state agencies have an appeal process similar to that proposed by the Lottery's rule making.

Board response: Numerous state agencies currently appear to have a similar appeal process to that proposed by the Lottery, where an administrative law judge issues a proposed decision that can be subsequently appealed to the agency head (director, commissioner, superintendent, etc.). Those include the following in alphabetical order of area of focus: Department of Administrative Services, Division of Banking, Department of Corrections, Division of Credit Unions, Department of Human Services, Department of Inspections and Appeals, Insurance Division, State Public Defender, Department of Public Health, Department of Public Safety, Department of Revenue (the Director of the Department can retain a contested case for hearing, but if it is not retained, an administrative law judge acts as presiding officer and the proposed decision is subject to appeal to the director), and Department of Transportation.

The amendments in this Adopted and Filed rule making differ from those published under Notice of Intended Action. The amendments have been revised to ensure that a variety of viewpoints are involved in the Lottery's decision-making process for administrative appeals.

#### *Adoption of Rule Making*

This rule making was adopted by the Board of Directors of the Iowa Lottery Authority on November 19, 2019.

#### *Fiscal Impact*

This rule making has no fiscal impact to the State of Iowa.

#### *Jobs Impact*

After analysis and review of this rule making, no impact on jobs has been found.

#### *Waivers*

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Authority for a waiver of the discretionary provisions, if any.

*Review by Administrative Rules Review Committee*

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

*Effective Date*

This rule making will become effective on January 22, 2020.

The following rule-making actions are adopted:

ITEM 1. Rescind rule 531—2.17(99G) and adopt the following **new** rule in lieu thereof:

**531—2.17(99G) Vendor appeals.**

**2.17(1) Filing vendor appeal.** Any vendor whose bid or proposal has been timely filed and who is aggrieved by the award of the lottery may file a written notice of appeal of the procurement decision with the Iowa Lottery, 13001 University Avenue, Clive, Iowa 50325-8225, within five business days of the date of the award. The notice of appeal must actually be received at this address within the time frame specified to be considered timely. The notice of appeal shall state the grounds upon which the vendor challenges the lottery's award.

**2.17(2) Presiding officer.** Upon receipt of a notice of a vendor appeal, the chief executive officer shall appoint an administrative law judge within the administrative hearings division of the department of inspections and appeals to serve as presiding officer, who would then issue a proposed ruling that the chief executive officer may hear on appeal.

**2.17(3) Hearing.** Where feasible, vendor appeals shall be conducted in accordance with 531—Chapter 5. In the case of conflict, the rules and procedures set forth in Chapter 2 control for vendor appeals submitted to the lottery. The presiding officer shall send a written notice of the date, time and location of the appeal hearing to the aggrieved vendor or vendors. The presiding officer shall hold a hearing on the vendor appeal within 60 days of the date the notice of appeal was received by the lottery, except that the administrative law judge has the ability to extend this duration where the administrative law judge determines good cause necessitates an extension.

**2.17(4) Discovery.** The parties shall serve any discovery requests upon the other parties at least 30 days prior to the date set for hearing. The parties must serve responses to discovery at least 20 days prior to the date set for the hearing.

**2.17(5) Witnesses and exhibits.** The parties shall contact each other regarding witnesses and exhibits at least ten days prior to the time set for the hearing. The parties must meet prior to the hearing regarding the evidence to be presented in order to avoid duplication or the submission of extraneous materials.

**2.17(6) Contents of decision.** The administrative law judge shall issue and serve upon all parties a written proposed decision that includes findings of fact and conclusions of law stated separately. The decision shall be based on the record of the appeal and shall conform with the requirements of Iowa Code chapters 17A and 99G.

**2.17(7) Status of ruling.** The ruling of the presiding officer constitutes a proposed ruling which may be appealed to the lottery's chief executive officer. The written decision of the chief executive officer on a vendor appeal constitutes a final decision of the lottery, which may be further appealed in accordance with Iowa Code section 17A.19.

**2.17(8) Stay of agency action for vendor appeal.**

*a.* Any party appealing the issuance of a notice of intent to award a contract may petition the presiding officer for a stay of the award pending its review. The petition for stay shall be filed with the notice of appeal and shall state the reasons justifying a stay. Any decision issued by a presiding officer regarding a stay may be appealed to the chief executive officer.

b. Any party adversely affected by a final decision and order may petition the chief executive officer for a stay of the agency decision and order pending judicial review. The petition for stay shall be filed with the chief executive officer within ten days of receipt of the final decision and order and shall state the reasons justifying a stay.

c. The presiding officer or chief executive officer may grant a stay upon a conclusion that the movant has satisfied the standards for the grant of a stay included in rule 531—5.29(17A) and Iowa Code section 17A.19(5).

This rule is intended to implement Iowa Code sections 99G.9, 99G.21, 99G.23, and 99G.37.

ITEM 2. Amend rule 531—5.2(17A) as follows:

**531—5.2(17A) Definitions.** Except where otherwise specifically defined by law:

“*Contested case*” means a proceeding defined by Iowa Code ~~subsection~~ section 17A.2(5) and includes any matter defined as a no factual dispute contested case under Iowa Code section 17A.10A.

“*Hearing board*” ~~means the board designated to resolve license disputes pursuant to Iowa Code Supplement section 99G.27(3) and these rules.~~

“*Issuance*” means the date of mailing or otherwise electronically providing a copy of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“*Party*” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“*Presiding officer*” means the administrative law judge.

“*Proposed decision*” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case ~~in which the hearing board did not preside.~~

ITEM 3. Rescind and reserve rule **531—5.3(17A)**.

ITEM 4. Amend rule 531—5.6(17A) as follows:

**531—5.6(17A) Notice of hearing.**

**5.6(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal or electronic service as ~~provided~~ permitted in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**5.6(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the lottery or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the lottery or the state and of parties’ counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding; and
- ~~g.—Reference to the procedural rules governing informal settlement;~~
- ~~h. g.~~ Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., ~~the hearing board, the chief executive officer of the lottery, members of the lottery authority board, administrative law judge from the department of inspections and appeals;~~ and;
- ~~i.—Notification of the time period in which a party may request, pursuant to Iowa Code section 17A.11(1) and rule 531—5.6(17A), that the presiding officer be an administrative law judge.~~

ITEM 5. Rescind paragraph 5.7(2)“h.”

ITEM 6. Amend subrule 5.7(5) as follows:

**5.7(5)** Unless otherwise provided by law, the chief executive officer or a designee, ~~and members of the lottery authority board,~~ when reviewing a proposed decision upon appeal to the lottery, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

ITEM 7. Amend subrule 5.12(2) as follows:

**5.12(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person’s last-known address or by electronic service as permitted by the presiding officer and the Iowa Rules of Civil Procedure. Service by paper or electronic mail is complete upon mailing, except where otherwise specifically provided by statute, rule or order.

ITEM 8. Amend subrule 5.12(3) as follows:

**5.12(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the ~~Office of the Chief Executive Officer, Iowa Lottery Authority, 13001 University Avenue, Clive, Iowa 50325-8225~~ presiding officer. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously ~~in the office of the chief executive officer~~ with the presiding officer.

ITEM 9. Amend subrule 5.12(4) as follows:

**5.12(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the ~~chief executive officer’s office~~ presiding officer, delivered to an established courier service for immediate delivery to ~~that office~~ the presiding officer, delivered via electronic mail or fax, or mailed by first-class mail or state interoffice mail to ~~that office~~ the presiding officer, so long as there is proof of mailing.

ITEM 10. Amend rule 531—5.25(17A) as follows:

**531—5.25(17A) Interlocutory appeals.** Upon written request of a party or ~~on its own motion sua sponte,~~ the ~~hearing board~~ chief executive officer may review an interlocutory order of the presiding officer. In determining whether to do so, the ~~hearing board~~ chief executive officer shall weigh the extent to which ~~its~~ the chief executive officer’s granting of the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

ITEM 11. Amend rule 531—5.26(17A) as follows:

**531—5.26(17A) Final decision.**

**5.26(1)** When the ~~hearing board~~ chief executive officer presides over the reception of evidence at the hearing, ~~its~~ the chief executive officer’s decision is a final decision.

**5.26(2)** When the ~~hearing board~~ chief executive officer does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the ~~hearing board~~ chief executive officer within the time provided in rule 531—5.27(17A).

ITEM 12. Amend rule 531—5.27(17A) as follows:

**531—5.27(17A) Appeals and review.**

**5.27(1) Appeal by party.** Any adversely affected party may appeal a proposed decision to the ~~hearing board~~ chief executive officer of the lottery within 30 days after issuance of the proposed decision.

**5.27(2) Review.** The ~~hearing board~~ chief executive officer may initiate review of a proposed decision on ~~its~~ the chief executive officer’s own motion at any time within 30 days following the issuance of such a decision.

**5.27(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Iowa lottery. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**5.27(4) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a non-appealing party, within 14 days of service of the notice of appeal. The ~~hearing-board~~ chief executive officer may remand a case to the presiding officer for further hearing or may ~~itself personally~~ preside at the taking of additional evidence.

**5.27(5) Scheduling.** The ~~presiding officer~~ chief executive officer shall issue a schedule for consideration of the appeal.

**5.27(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs.

The ~~hearing-board~~ chief executive officer may resolve the appeal on the briefs or provide an opportunity for oral argument. The ~~hearing-board~~ chief executive officer may shorten or extend the briefing period as appropriate.

ITEM 13. Amend rule 531—5.29(17A) as follows:

**531—5.29(17A) Stays of agency actions.**

**5.29(1) When available.**

a. Any party to a contested case proceeding may petition the lottery for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The ~~hearing-board~~ chief executive officer of the lottery may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the lottery for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**5.29(2) When granted.** In determining whether to grant a stay, the chief executive officer or presiding officer ~~or hearing-board~~ shall consider the factors listed in Iowa Code section 17A.19(5).

**5.29(3) Vacation.** A stay may be vacated by the issuing authority upon application of the lottery or any other party.

[Filed 11/25/19, effective 1/22/20]

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EDITOR’S NOTE: For replacement pages for IAC, see IAC Supplement 12/18/19.